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United States Department of Labor, Occupational Safety and Health Administration, Region 1, Boston, MA and American Federation of Government Employees, AFL-CIO, Local 948

58 FLRA 213

Federal Labor Relations Authority

58 FLRA No. 55

BN-CA-00415

December 18, 2002

Related Index Numbers

72.353 Discrimination Related to Union Membership or Concerted Activity, Defenses Against Charge of Discrimination, Change in Work Assignment

72.582 Refusal to Bargain in Good Faith, Defenses to Refusal to Bargain Charge, Change of Employer

72.6 Unilateral Change in Term or Condition of Employment

72.661 Unilateral Change in Term or Condition of Employment, Defenses to Unilateral Change, De Minimis

73.472 Refusal to Bargain in Good Faith, Defenses to Refusal to Bargain Charge, Change of Union

Judge / Administrative Officer

Cabaniss, Chair; Pope and Armendariz, Members

Ruling

The FLRA dismissed the original complaint filed by the union. The union's original complaint stated that the agency failed to bargain the impact and implementation of its decision to terminate an employee's right to use a government vehicle.

Meaning

The FLRA ruled that the agency "simply applied existing conditions of employment applicable to all 11(c) investigators."

Case Summary

The agency filed an exception with the FLRA regarding an administrative law judge's decision. The ALJ decided the agency did not violate the applicable statute when it terminated an employee's use of a government vehicle. However, he determined the agency committed an unfair labor practice by refusing to bargain over the impact and implementation of terminating the grievant's use of the vehicle.

The grievant requested to be reassigned from a compliance safety and health officer to an 11(c) investigator. Pursuant to the Springfield Agreement, the CSHO position allowed the grievant to take her government vehicle home. However, the ALJ determined the agreement did not allow this benefit to investigators. In fact, the collective bargaining agreement required prior written approval from management before an employee could take government vehicles home.

The agency's action was based on retaliation for the employee engaging in protected union activity, the union claimed. Also, the agency failed to bargain over the impact and implementation of its decision prior to termination of this benefit.

This change in the employee's conditions of employment -- no longer permitted to have a government-assigned vehicle -- was more than a de minimis effect, according to the arbitrator. Therefore, the agency was required to bargain over the impact and implementation of its decision.

The agency argued it was under no obligation to bargain the grievant's access to the government vehicle because it did not initiate a change. The grievant chose to move to the 11(c) position. Since there was "no change in conditions of employment affecting bargaining unit employees, there is no duty to bargain." The arbitrator found the agency "did not change the utilization" of the use of government vehicles under the SA, the agency argued..

The FLRA determined the union had ample opportunity to question a witness but chose not to. Regarding the change in conditions of employment,

the FLRA ruled the agency "simply applied existing conditions of employment applicable to all 11(c) investigators." The complaint was dismissed in its entirety.

Full Text

Decision and Order

I. Statement of the Case

This unfair labor practice case is before the Authority on an exception to the attached decision of the Administrative Law Judge filed by the Respondent. The General Counsel has filed an opposition to the exception. The Union has filed a cross-exception.

The complaint alleges that the Respondent violated § 7116(a)(1), (2) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by terminating an employee's use of a take home government operated vehicle (GOV) based on retaliation for the employee engaging in protected activity. Moreover, the complaint alleges that the Respondent unlawfully failed to bargain over the impact and implementation of its decision prior to termination of this benefit.

The Judge found that the Respondent did not terminate the employee's use of a take home GOV based on protected activity. However, the Judge determined that the Respondent committed an unfair labor practice by refusing to bargain over the impact and implementation of terminating the employee's use of a take home GOV. Decision at 2, 23 (*citing* § 7116(a) (1) and (5)).

Upon consideration of the Judge's decision and the entire record, we conclude for the reasons discussed below that the Respondent did not commit the unfair labor practices alleged in the complaint. Accordingly, we will dismiss the complaint.

II. Background and Judge's Decision

In February of 2000, an employee of the Respondent's Springfield Area Office voluntarily sought reassignment from her position as a Compliance Safety and Health Officer (CSHO) to that of an available 11(c) investigator. While serving as a CSHO, a position which by its nature required the employee to load and unload equipment into a vehicle in order to perform necessary field testing, the employee had been allowed to take a GOV to her home work site pursuant to the parties' Springfield Agreement.[2] Decision at 7, 21. However, the Judge determined that this benefit under the Springfield Agreement applied only to employees who were CSHOs, not 11(c) investigators.[3] In reaching this determination, the Judge relied on the wording of the agreement and testimony at the hearing, including that of the affected employee.[4]

As such, the Judge determined that under the Springfield Agreement, which only authorizes CSHOs to have a take home GOV, and Article 17 of the parties' collective bargaining agreement, which requires all other employees to get prior written approval from management before being allowed to use take home GOV's, the Respondent's decision to terminate the employee's take home use of her GOV was not retaliation for her prior engagement in protected activity.[5] Moreover, the Judge noted that " [b] ecause [the Respondent] applied the terms of the Springfield Agreement, Respondent changed no provision of the Agreement and was under no duty to bargain." Decision at 22, Nonetheless, the Judge found that:

Although [the] Respondent did not change the utilization of GOVs under the Springfield Agreement, and, pursuant to that Agreement, it lawfully required [the employee] to return her assigned GOV, because she no longer was authorized under that Agreement to have an assigned GOV, nevertheless it changed her conditions of employment ... [and the] Respondent was obligated to bargain over the impact and implementation of that decision if the changes have more than a de minimis effect on conditions of employment.

Decision at 22-23 (*citing Air Force Logistics Command, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.,* 53 FLRA 1664, 1668 (1998)

(Warner Robins)); *Air Force Accounting and Finance Ctr., Denver, Co.*, 42 FLRA 1196, 1205, 1207 (1991) (Air Force Accounting). Accordingly, the Judge determined that the Respondent changed conditions of employment by deciding to take back the vehicle and found that since the employee would have to first commute to work to get a government pool vehicle, a commute of between 65 and 80 minutes, the change was more than de minimis. Decision at 23. As such, the Judge found that the Respondent violated § 7116(a)(1) and (5) by refusing to bargain over the impact and implementation of its decision. *Id.*

III. Positions of the Parties

A. Union's Cross-Exception

The Union argues that it was denied the right to examine a witness during the hearing which could have helped it establish one of its contentions, i.e., that the employee was denied use of a GOV based on retaliation. Specifically, it argues that the "Judge erred when he did not allow the FLRA/Union rebuttal witness ... to finish her testimony." Cross-Exception at 1 referring to Transcript (Tr.) at 333-56. The Union does not address the Respondent's exception.

B. Respondent's Exception

The Respondent asserts that it had no bargaining obligation with the Union regarding employee access to GOVs because it did not initiate a change involving the use of a GOV. The Respondent argues that where "there is no change in conditions of employment affecting bargaining unit employees, there is no duty to bargain" and that "no change whatsoever" took place regarding conditions of employment affecting the employee in question. Exception at 9. It also contends that the duty to bargain is only triggered by a "management-initiated change" and that the changes here came about as a result of the employee's voluntary move to the 11(c) position. *Id.* at 11. In that regard, it notes that the two cases relied on by the Judge, Warner Robins and Air Force Accounting, both involved an agency's unilateral change to conditions of employment prior to finding that a duty to bargain existed. *Id.* at 12.

Finally, the Respondent notes that not only did the Judge find that the employee knew that she would not be entitled to a take home GOV, but that the Judge specifically found that the Respondent "did not change the utilization of GOVs under the Springfield Agreement." *Id.* at 10 (citing Decision at 22).

The Respondent does not address the Union's cross-exception.

C. General Counsel's Opposition

The General Counsel argues that the Judge correctly found that the Respondent's determination to end the employee's use of a take home GOV was a change in conditions of employment which required Union notification and an opportunity to bargain its impact and implementation. The General Counsel further asserts that it was the Respondent that changed the employee's conditions of employment under the Springfield Agreement, because the Respondent maintained discretion to allow the employee to continue to use a take home GOV, as evidenced by the long time the Agency took before it formally requested its return, but it nonetheless decided to terminate this benefit. Opposition at 5. In so arguing, the General Counsel disagrees with the Respondent's assertion that it merely enforced an existing agreement, stating that the Judge found that the Respondent's "policy did not prohibit the assignment of GOVs to 11(c) investigators, but merely favored the use of pool cars or reimbursement of mileage for use of a POV." *Id.* at 4. Accordingly, the General Counsel concedes that while the substance of the Respondent's decision was not negotiable, given that the effect of the Respondent's decision was more than de minimis, the Respondent was required to bargain over the impact and implementation of its decision. *Id.* at 6 (*citing General Services Admin., Nat'l Capital Region, Federal Protective Services Div., Washington, D.C.*, 52 FLRA 563, 566 (1996)) .

The General Counsel does not address the Union's cross-exception.

IV. Analysis of the Union's Cross-Exception

In addressing this argument, we have reviewed the pertinent portions of the hearing transcript and will briefly set forth what transpired. Of significance, during the testimony of the last witness called (a rebuttal witness for the General Counsel) the Respondent's attorney objected to the testimony of the witness based on materiality. Subsequently, the Judge and the General Counsel's attorney discussed the materiality of the witness's testimony, and based on this discussion, the General Counsel's attorney, without formal objection, ultimately abandoned questioning the witness by stating, "I have nothing further, Your Honor." Tr. at 341, 346. At that point, the Judge and Respondent's attorney then exchanged opinions as to whether a bench decision was warranted. *Id.* at 346-53. The Judge concluded this conversation by stating, "All right. Are we completed?" *Id.* at 353. The General Counsel's attorney again stated, "I have nothing further Your Honor," whereupon the parties again briefly discussed their relative positions. *Id.* at 353-54. The Judge then asked the Respondent's attorney if there was anything else and whether it had any more "rebuttal you want to put on?" *Id.* at 354. At that point the Respondent's attorney stated, "No, Your Honor?" *Id.* Following that, the Judge stated, "All right if there's nothing further to come before me ... " *Id.* at 355. After making this statement, the Respondent's attorney asked for clarification as to a specific matter, followed by the Union representative stating, "Your Honor[,] I just would like to change the address of any materials from ... " *Id.* at 356. The Judge obliged the Union representative and allowed him to give the parties a new address. Afterward, the Judge stated, "All right, we're through." *Id.*

Upon review of the transcript, it is clear that all the parties were able to express their concerns to the Judge after the General Counsel's attorney had abandoned questioning the rebuttal witness and prior to the Judge ending the hearing. Within this time frame, however, the Union's representative, while noting a need to change a service address, did not take the opportunity to question this witness despite having the apparent opportunity to do so. Accordingly, as the Union's representative had the opportunity to either ask to question this witness, or at least formally object to a perceived inability to do so, but chose not to, the Union's request to remand this matter and re-open the record to obtain evidence that was readily available at the time of the hearing is denied. 5 C.F.R. § 2423.30(d) ("Any objection not raised to the Administrative Law Judge shall be deemed waived."); 5 C.F.R. § 2429.5 ("The Authority will not consider ... any issue, which was not presented in the proceedings before the ... Administrative Law Judge.")

V. Analysis of the Respondent's Exception

The complaint alleges, as relevant here, that the Respondent violated the Statute by failing to bargain over the impact and implementation of its decision to terminate an employee's assignment of a Government-owned vehicle. In order to determine whether the Respondent violated the Statute, there must be a threshold finding that the Respondent changed the employee's conditions of employment. *See, e.g., United States Immigration and Naturalization Serv., New York, N.Y.*, 52 FLRA 582 (1996); *United States Immigration and Naturalization Serv., Houston Dist., Houston, rex.*, 50 FLRA 140, 143 (1995) (INS). The determination of whether a change in conditions of employment has occurred involves a case-by-case analysis and an inquiry into the facts and circumstances regarding the respondent's conduct and employees' conditions of employment. *See 92 Bomb Wing, Fairchild Air Force Base, Spokane, Wash.*, 50 FLRA 701, 704 (1995); INS, 50 FLRA at 144.

The Respondent claims that it did not initiate any change in conditions of employment. According to the Respondent, the employee voluntarily requested a reassignment from a CSHO position, which authorized her to have her own assigned GOV, to an 11(c) investigator position which did not permit the assignment of her own GOV. The Respondent argues that since it simply applied existing conditions of employment applicable to all 11(c) investigators and

properly directed the employee, who was now in an 11(c) investigator position as the result of her request to be reassigned, to return the GOV, its action did not trigger any duty to bargain. We agree.

The record shows that the employee was authorized the assignment of a GOV as a condition of her employment as a CSHO. As stated earlier, the CSHO position requires incumbents to load and unload equipment into vehicles in order to perform necessary field testing. The Springfield Agreement expressly authorizes CSHOs -- and only CSHOs -- the assignment of a GOV that may be maintained at the home work site. It was pursuant to the Springfield Agreement that the employee, who performed field testing, was assigned a GOV to take to her home work site.

In contrast to the CSHO position, employees occupying 11(c) investigator positions are not authorized the assignment of a GOV under the Springfield Agreement. In fact, in distinguishing the duties of a CSHO from an 11(c) investigator, the Judge found that, as an 11(c) investigator, the employee "had no equipment to load and unload ... " Judge's Decision at 21. Further, the Judge found that the Respondent did not change the assignment of GOVs under the Springfield Agreement.[6]

Although the Judge found that the Respondent did not change the assignment of GOVs under the Springfield Agreement, he went on to conclude that the Respondent changed the employee's condition of employment when it terminated her assignment of the GOV. This finding is in error. The Respondent did not change the employee's conditions of employment; rather, the employee changed her conditions of employment by voluntarily seeking reassignment from one position to another position. In the employee's former CSHO position, one of her conditions of employment in that position was that she was authorized the assignment of a GOV. When she was voluntarily reassigned to an 11(c) investigator position, one of her conditions of employment in that position was that she was not authorized the assignment of a GOV. This change was not initiated by the Respondent; instead, it was the consequence of the employee assuming a new position. As such, the Respondent did not change her conditions of employment, and it did not incur a bargaining obligation.

The General Counsel argues that the Respondent had the discretion to permit the employee to continue to be assigned a GOV once she voluntarily transferred to an 11(c) investigator position. However, the Respondent's discretion to do so is not relevant to a determination as to whether the Respondent changed conditions of employment so as to give rise to a bargaining obligation. The General Counsel also asserts that the obligation to bargain can attach even to management-initiated changes in conditions of employment affecting only one employee. While this is true, this principle is inapposite here because management did not initiate any change in conditions of employment.

Accordingly, for the reasons stated above, the Respondent did not change conditions of employment in this case and incurred no bargaining obligation by terminating the employee's assignment of the GOV after she became an 11(c) investigator.

VI. Order

We dismiss the complaint in its entirety.

Concurring Opinion of Chairman Cabaniss

While I agree that the Respondent did not commit an unfair labor practice by refusing to bargain over the impact and implementation of a change to conditions of employment, I do so for an additional reason and to address a longstanding confusion in our precedent. I would find that there was no change to "conditions of employment" initiated by either party, rather, the only change that occurred here was a change in working conditions.

I believe at issue in this case, at least in part, is confusion between changes to "conditions of employment" and changes to "working conditions." The Judge found that the parties had negotiated an agreement that provided take home GOVs only for

CSHO personnel, and that the Respondent lawfully complied with that agreement by requiring, pursuant to that agreement, that the employee return her take home GOV as she was no longer authorized to have one. However, the Judge determined that in so doing, the Respondent's decision to comply with this negotiated agreement changed a "condition of employment" and that negotiation over the impact and implementation of that decision, rather than its substance, was required. Decision at 22-23.

As reflected in our Statute, "conditions of employment" is a term of art expressly defined at § 7103(a)(14) that means "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions" (emphasis omitted). Clearly, "conditions of employment" and "working conditions" are related, but they are not the same thing. For example, "working conditions" would be an employee's work starting and stopping times, or whether the employee has the ability to take home a GOV: "conditions of employment" would be the "rules, regulations, or otherwise" that define the hours of work for the bargaining unit, or establish what employees have the right to take that GOV home. There should be no doubt that collective bargaining agreements can constitute a condition of employment as well, since § 7114(b) (2) notes that the statutory duty to bargain in good faith includes the obligation that duly authorized representatives at negotiations be prepared to discuss and "negotiate on any condition of employment." Additionally, § 7103(a)(12), in defining "collective bargaining" also notes that it involves the parties' efforts "to reach agreement with respect to conditions of employment affecting such employees". And, I note that in the present instance the parties' Springfield Agreement established which employees were entitled to take home a GOV.

Our precedent, in its discussion of the statutory duty to bargain, focuses on whether there has been a change to "conditions of employment" and not whether "working conditions" have been changed. *See, e.g., Warner Robins*, 53 FLRA at 1668. There is nothing new about this emphasis on conditions of employment, although the confusion about it continues to this day. An early case before the Authority helps to explain this confusion and why the Statute requires that we distinguish between changes to conditions of employment and changes to working conditions.

In *Naval Amphibious Base, Little Creek, Norfolk, VA*, 9 FLRA 774 (1982) (Little Creek), the General Counsel issued a complaint based on the agency's failure to bargain when it changed the employment status (from regular part-time to intermittent) of two employees as a result of them being subjected to nondisciplinary adverse actions. The agency argued, inter alia, that its actions had not changed conditions of employment, even though it was undisputed that the employees had indeed been adversely affected by the agency's actions.[7] The agency also pointed out that it was acting in accordance with the terms of an existing agreement between the parties.

In dismissing the complaint, the Authority (being fully aware of the impact the employees had suffered) took express cognizance of the terms of the parties' agreement and found that in effecting the adverse actions against the employees, the agency still had not "established new, or changed existing, personnel policies, practices or matters affecting working conditions." *Id.* at 777. From that discussion, I conclude that changes to an employee's personal situation, even including loss of pay, are not the proper focus in determining whether or not conditions of employment have been changed. Rather, one looks at whether the agency has changed those "existing personnel policies, practices or matters affecting [the employee's personal situation, i.e., his or her "working conditions"]." *Id.*

The Authority has said little of the distinction/discussion set out in Little Creek, and few references to it exist in our precedent. Moreover, with the development of the "covered by" test set out in *SSA*, 47 FLRA 1004, this distinction between "conditions of employment" and "working conditions" has seemingly become even more invisible. Part of this problem stems from the fact that

the "covered by" test in *SSA* doesn't discuss at all the statutory requirement that there first be a change in conditions of employment. However, I note that *SSA* dealt with union-initiated mid-term bargaining, and in such contexts the issue of whether an agency has changed "conditions of employment" is irrelevant.

This question of whether conditions of employment have been changed was further impacted by the Authority's decision in *United States Dep't. of Transportation, FAA, Wash., D.C. and Michigan Airway Facilities Sector, Bellville, MI*, 44 FLRA 482 (1992) (FAA). In that decision, in note 3 at 44 FLRA 493, the Authority decided to no longer first determine whether conditions of employment had been changed if the conditions of employment were set out in the parties' agreement. The text of the footnote is set out below.

We note that the Judge found that the Respondents did not change employees' conditions of employment when it selected radar technicians for temporary assignment. In so finding, the Judge stated, in part, that "[t]o the contrary, Respondent acted fully in accord with the provisions of Article 25 of its Agreement ... " Judge's Decision at 13. We reject the Judge's reliance on the parties' agreement as a factor in determining whether the Respondent changed employees' conditions of employment. The determination as to whether a change occurred involves an inquiry into the facts and circumstances regarding the Respondent's conduct and employees' conditions of employment. Consideration of the parties' agreement becomes relevant if the Respondent raises it as a defense after a determination is made that the Respondent's actions gave rise to a bargaining obligation. [Emphasis omitted.]

With all due deference to that decision, it makes no sense to not examine a collective bargaining agreement, which by definition is meant to create "conditions of employment" for bargaining unit employees, in first determining whether any of those "conditions of employment" have been changed such that a bargaining obligation has been created. Therefore, at some point in time I would expressly set aside the FAA decision to the extent of that erroneous footnote and affirm the need to examine the content of collective bargaining agreements before deciding to issue a complaint because of an alleged change to conditions of employment.

In the present matter, the parties' Springfield Agreement expressly identifies which employees are entitled to take home a GOV and, by obvious implication, which employees are not so entitled. The Judge found that the terms of the agreement had not been changed by the Respondent, but found that conditions of employment had been changed because the employee in question was no longer entitled to take home a GOV. I submit that the Judge has failed to note the distinction between conditions of employment and working conditions. By the Judge's own decision, it is established that the Respondent had not changed any "personnel policies, practices, and matters, ... affecting working conditions". Rather, it was the working conditions of the employee, i.e., having the right to take home a GOV, that had changed, and the holding in Little Creek establishes that changing working conditions means nothing unless conditions of employment have also been changed.

Therefore, I would dismiss the complaint in this matter because there has been no change to any conditions of employment, only working conditions.

[1]Chairman Cabaniss' concurring opinion appears at the end of this decision.

[2]The Springfield Agreement reads in pertinent part:

7. Two additional GOVs will be leased and each participating CSHO who so desires will be assigned a GOV which will be kept at the home work site.

Decision at 7.

[3]The Judge noted that all non-CSHOs at Springfield were governed by Article 17, Section 2, of the parties' National Agreement, which limits the parking of GOV's at or near the employee's residence in non-duty hours and requires the "prior written approval to park the Government owned or leased

vehicle at or near his/her residence during non-duty hours. ..." Decision at 20.

Moreover, the Judge found that the employee, as an 11(c) investigator, no longer had "equipment to load and unload" from her vehicle. *Id.*at 21.

[4]The employee also served as a Union steward and in this capacity negotiated the Springfield Agreement with the Respondent. Decision at 6, 7. The Judge noted that the language in the Springfield Agreement was based on an agreement the Respondent had reached with the Union at field offices outside the Springfield area. *Id.* at 7. Unlike the Springfield Agreement, however, the other agreement specifically included both 11(c) investigators and CSHO's as positions to which an employee was allowed use of a take home GOV. *Id.*

[5]The Respondent did not actually terminate the employee's use of the GOV until April 28, 2000, approximately two months after the employee was reassigned. Decision at 18. However, the Judge noted that the decision to terminate the employee's use of the GOV was made on February 24, 2000. *Id.* at 15.

[6]The General Counsel did not except to the Judge's conclusions concerning the Springfield agreement. Opposition at 6 n.5.

[7]The Authority noted that the employees suffered a reduction in working hours and lost their eligibility for annual, sick and holiday leave, and health benefits, among other things. *Id.* at 775.

Statutes Cited

5 USC 7103(a)(14)
5 USC 7116(a)(2)
5 USC 7116(a)(5)
5 USC 7116(a)(1)
5 USC 7103(a)(12)

Regulations Cited

5 CFR 2423.30(d)
5 CFR 2429.5

Cases Cited

42 FLRA 1196
53 FLRA 1664
52 FLRA 563
52 FLRA 582
50 FLRA 140
50 FLRA 701
9 FLRA 774
47 FLRA 1004
44 FLRA 482
44 FLRA 493

